

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH STECK,

Plaintiff,

v.

NURSE KEPPLER,

Defendants.

Case No. C15-532 RAJ-BAT

**REPORT AND
RECOMMENDATION**

On March 9, 2016, Plaintiff Joseph Steck, a pro se prisoner, filed an unsigned and undated motion to voluntarily dismiss this action without prejudice. Dkt. 14. As grounds for the motion, plaintiff states only, “to seek legal advice and council.” *Id.* Plaintiff’s motion was filed almost one year after he began this lawsuit, several months after the discovery deadline had expired, and one month after Defendant Keppler filed her motion for summary judgment. Dkt. 9, 12. Plaintiff did respond to the motion for summary judgment.

Defendant Keppler did not oppose plaintiff’s motion to voluntarily dismiss his claims, but contended that the dismissal should be with prejudice as she has spent significant time and resources preparing her motion for summary judgment. Alternatively, defendant agreed to dismissal without prejudice with the payment of her reasonable attorney fees. Dkt. 15. Plaintiff filed no reply to defendants’ response.

1 Because plaintiff's motion to voluntarily dismiss is unsigned and undated, it was not
2 entirely clear to the Court what relief plaintiff seeks. For that reason, the Court directed plaintiff
3 to notify the Court if he wished to withdraw his motion to voluntarily dismiss and continue with
4 the case. Dkt. 16. In addition, the Court notified plaintiff that if he chose to proceed with the
5 voluntary dismissal, the Court was inclined to recommend that the case should be dismissed with
6 prejudice because the case has been pending for a year, plaintiff began and pursued this action
7 pro se, the discovery and dispositive deadlines have passed, and defendant has expended effort
8 and expense in preparing her summary judgment motion. *Id.*

9 Plaintiff was given until May 2, 2016 to notify the Court of how he wished to proceed.
10 *Id.* Plaintiff has not responded to the Court's Order.

11 DISCUSSION

12 Unless otherwise stated, a dismissal under Rule 41(a)(2) is without prejudice. Fed. R.
13 Civ. P. 41(a)(2). A court should grant a motion for voluntary dismissal under Rule 41(a)(2)
14 unless the defendant shows that he will suffer legal prejudice as a result. *Smith v. Lenches*, 263
15 F.3d 972, 975 (9th Cir.2001). "[L]egal prejudice' means 'prejudice to some legal interest, some
16 legal claim, some legal argument.'" *Smith*, 263 F.3d at 976 (*quoting Westlands Water Dist. v.*
17 *United States*, 100 F.3d 94, 96 (9th Cir.1996). Legal prejudice does not result because the
18 dispute remains unresolved, there is a threat of future litigation, or a plaintiff may gain a tactical
19 advantage by the dismissal. *Smith*, 263 F.3d at 976.

20 While a dismissal without prejudice is the default position stated in Rule 41(a)(2), the
21 court has broad discretion whether to dismiss an action with or without prejudice. *Hargis v.*
22 *Foster*, 312 F.3d 404, 412 (9th Cir.2002). The purpose of Rule 41(a)(2) is to permit an action to
23 be dismissed without prejudice as long as the defendant will not be prejudiced or unfairly

1 affected by the dismissal. *Stevedoring Services of America v. Armilla Intern. B.V.*, 889 F.2d 919,
 2 921 (9th Cir.1989). In determining if an action should be dismissed with prejudice, the court can
 3 consider the fact that the defendant has filed a motion for summary judgment. *In re Sizzler*
 4 *Restaurants Intern., Inc.*, 262 B.R. 811, 822 (C.D.Cal.2001). “An attempt to avoid an adverse
 5 decision on the merits may constitute legal prejudice. *Id.*, see *Phillips USA, Inc. v. Allflex USA,*
 6 *Inc.*, 77 F.3d 354, 358 (10th Cir.1996) (“party should not be permitted to avoid an adverse
 7 decision on a dispositive motion by dismissing a claim without prejudice”).

8 As previously noted, this case has been pending for a year, plaintiff began and pursued
 9 this action pro se, the discovery and dispositive motions deadlines have passed, and defendant
 10 has expended effort and expense in preparing her summary judgment motion. For these reasons,
 11 the Court recommends dismissing this lawsuit with prejudice.

12 CONCLUSION

13 This lawsuit should be **DISMISSED with prejudice**. Any objections to this
 14 Recommendation must be filed no later than **Monday, June 6, 2016**. The Clerk should note the
 15 matter for **Wednesday, June 8, 2016**, as ready for the District Judge’s consideration if no
 16 objections are filed. Objections shall not exceed ten pages. The failure to timely object may
 17 affect the right to appeal.

18 DATED this 17th day of May, 2016.

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20 BRIAN A. TSUCHIDA
 21 United States Magistrate Judge
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